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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

TADARRYL SMITH, a single person, Plaintiff/Appellee, v. SITCHEL YEASIN and JANE DOE YEASIN, a married couple; and YELLOW CAB, a business entity, Defendants/Appellants.	2 CA-CV 2008-0076 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C 20052488

Honorable Javier Chon-Lopez, Judge

AFFIRMED

Law Office of Eric A. Thomson
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By John A. Elardo and Josh A. Valdez — Phoenix
Attorneys for Defendants/Appellants

H O W A R D, Presiding Judge.

¶1 In this personal injury action, defendants/appellants Sitchel Yeasin and Yellow Cab (collectively Yellow Cab) appeal from the trial court's judgment, entered after a jury verdict solely on the issue of damages, in favor of the plaintiff, Tadarryl Smith. Yellow Cab argues that the trial court erred when it granted Smith's motion to exclude a reference to Smith's alcohol use and when it granted Smith's pretrial motion to preclude evidence relating to Smith's marijuana use. Finding no abuse of discretion in the trial court's rulings, we affirm the judgment.

Background

¶2 "We view the facts in the light most favorable to upholding the jury's verdict." *Jimenez v. Wal-Mart Stores, Inc.*, 206 Ariz. 424, ¶ 2, 79 P.3d 673, 674 (App. 2003). Tadarryl Smith was injured when a taxi cab collided with Smith's car. After the accident, Smith was transported by ambulance to a local hospital, where he was discharged after receiving stitches. Smith later began to experience neck and back pain. He then sued Yellow Cab, the owner of the taxi, and Yeasin, the cab's driver.

¶3 Yellow Cab stipulated to liability, and the case went to trial only on the issue of damages. Before trial, Smith moved to prevent Yellow Cab from offering in evidence a portion of a medical report indicating that Smith had used marijuana in the months following the accident. The trial court granted this motion. During trial, Smith moved to preclude Yellow Cab from referring to a notation in the ambulance report stating "pt. has + ETOH."

This motion was also granted. The jury awarded Smith $20,162.40 in damages. This appeal follows.

Preclusion of Evidence From Ambulance Report

¶4 Yellow Cab argues the trial court erred when, pursuant to Rule 403, Ariz. R. Evid., it granted Smith's motion to redact a notation in an ambulance report that suggests Smith had consumed alcohol on the night of the accident.[1] We review a trial court's "evidentiary rulings for a clear abuse of discretion" and "will not reverse unless unfair prejudice resulted . . . or the court incorrectly applied the law." *Higgins v. Assmann Elec., Inc.*, 217 Ariz. 289, ¶ 35, 173 P.3d 453, 462 (App. 2007), *quoting Larsen v. Decker*, 196 Ariz. 239, ¶ 6, 995 P.2d 281, 283 (App. 2000).

¶5 All relevant evidence is generally admissible. Ariz. R. Evid. 402. Under Rule 403, however, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." We give great deference to the trial court's balancing of probative value against unfair prejudice because it is in the best position to make that judgment. *See Monthofer Inv. Ltd. P'ship v. Allen*, 189 Ariz. 422, 428, 943 P.2d 782, 788 (App. 1997) (noting trial court's unique position to determine admissibility of evidence pursuant to Rule 403); *see also State*

[1] Although the trial court granted Smith's request, the exhibit admitted in evidence was not redacted and contained the notation. Because the court's ruling presumably prevented Yellow Cab from arguing the notation meant Smith had used alcohol, we address Yellow Cab's arguments.

v. Harrison, 195 Ariz. 28, ¶ 21, 985 P.2d 513, 518 (App. 1998), *approved*, 195 Ariz. 1, 985 P.2d 486 (1999) (trial court in "best position" to determine admissibility under Rule 403).

¶6 Here, Yellow Cab argues that evidence showing Smith consumed alcohol on the night of the accident is relevant and necessary for impeachment purposes. But the only evidence precluded was the notation, "pt. has + ETOH," in an ambulance report. No evidence in the record explains to the trial court, the jury, or this court what the author of that notation meant by it or what its significance, if any, might be.

¶7 Furthermore, because the parties stipulated to liability, the amount of damages was the only issue at trial. Smith's primary damages claim involved back and neck pain—that did not begin until he was discharged from the hospital and then continued over the following weeks and months. Therefore, the suggestion that Smith had consumed alcohol before the accident is, at best, minimally relevant to his injury claim. Yellow Cab claims, however, that the notation could be used to impeach Smith on his negative answer to the interrogatory concerning alcohol use, but the trial court could have found such a use would have been improper. *See Pub. Serv. Co. of Okla. v. Bleak*, 134 Ariz. 311, 323, 656 P.2d 600, 612 (1982) ("[A] witness cannot be impeached on collateral matters."). And the trial court could have found that, without more explanation, the notation "pt. has + ETOH," had substantial potential to confuse the issues and mislead the jury. Additionally, the court could have properly determined that a suggestion of alcohol use before driving, based on an unexplained notation, would unfairly prejudice Smith with the jury. Accordingly, the trial

court did not rule arbitrarily or abuse its discretion when it found the probative value of the notation "pt. has + ETOH" was substantially outweighed by the danger of unfair prejudice and confusion.

¶8 The holding in *Rhue v. Dawson*, 173 Ariz. 220, 841 P.2d 226 (App. 1992), cited by Yellow Cab, does not compel a different conclusion. In *Rhue*, Division One of this court concluded that evidence of a party's "alcoholism and excessive alcohol consumption could affect his credibility and memory loss." *Id.* at 225, 841 P.2d at 220. The mere notation "pt. has + ETOH" does not equate to either alcoholism or excessive alcohol consumption.

¶9 Yellow Cab also argues that the precluded evidence was admissible to "complete the story." But the trial court is permitted under Rule 403 to restrict evidence elicited to complete the story. *See State v. Weaver*, 158 Ariz. 407, 410, 762 P.2d 1361, 1364 (App. 1988). Accordingly, the trial court did not abuse its discretion when, pursuant to Rule 403, it excluded evidence indicating that Smith had consumed alcohol on the night of the accident.

¶10 Yellow Cab contends, however, that the trial court should have issued a limiting instruction regarding the evidence of Smith's alcohol use, rather than excluding the evidence altogether. Although the trial court could have given a limiting instruction as a less restrictive alternative to exclusion, it was not required to do so. *See Girouard v. Skyline Steel, Inc.*, 215 Ariz. 126, ¶ 22, 158 P.3d 255, 262 (App. 2007) (province of trial court to consider whether less restrictive alternative, such as a limiting instruction should be used).

And evidence must first be admissible before a limiting instruction can be required. *See* Ariz. R. Evid. 105. Here, the evidence was deemed inadmissible. Because the trial court did not abuse its discretion in making that determination, no evidence was admitted that required a limiting instruction.

¶11 *Readenour v. Marion Power Shovel*, 149 Ariz. 442, 449, 719 P.2d 1058, 1065 (1986), cited by Yellow Cab as requiring the use of a limiting instruction, actually supports our conclusion that the trial court did not abuse its discretion in this case. In *Readenour*, our supreme court stated that Rule 403 limits the "broad policy of admission" of evidence on which Yellow Cab relies. *Id*. Rule 403 is a "threshold" that protects against "the danger that the jury may use evidence for an improper purpose." *Id.* A limiting instruction is merely a "second line of defense" that may be used when evidence has been admitted despite a Rule 403 objection. *Id.* at 450, 719 P.2d at 1066.

¶12 Finally, even if the trial court erred in excluding the ETOH notation, Yellow Cab has not shown it was prejudiced by the ruling. *See Higgins*, 217 Ariz. 289, ¶ 35, 173 P.3d at 462 (evidentiary ruling not abuse of discretion unless law applied incorrectly or unfair prejudice resulted). Yellow Cab introduced evidence that Smith had been at a bar on the night of the accident and that his post-accident nausea could have been caused by drinking. Accordingly, despite the trial court's ruling redacting the "pt. has + ETOH" notation, the jury nevertheless heard evidence from which it could readily infer that Smith had consumed alcohol before the accident. And with respect to Yellow Cab's argument that it could have

used evidence of Smith's alcohol use to contradict Smith's statements regarding loss of consciousness, Yellow Cab cross-examined Smith about prior inconsistent statements regarding his loss of consciousness and other matters.

Preclusion of Evidence of Marijuana Use

¶13 Yellow Cab also argues that the trial court erred when it granted Smith's pretrial motion pursuant to Rule 403 to exclude evidence of Smith's marijuana use.[2] We review a trial court's "evidentiary rulings for a clear abuse of discretion." *Higgins*, 217 Ariz. 289, ¶ 35, 173 P.3d at 462. As noted above, relevant evidence is generally admissible but may be excluded pursuant to Rule 403 if "its probative value is substantially outweighed by the danger of unfair prejudice." Ariz. R. Evid. 403.

¶14 Here, Yellow Cab argues that a reference in a doctor's report to Smith's attempting to self-medicate with marijuana was relevant to impeach his credibility and also appears to suggest it showed Smith failed to mitigate his damages. But Yellow Cab did not

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[2]Yellow Cab has not cited a transcript or minute entry embodying this ruling but only a later reference to the ruling by the trial court. In general, the citations to the record in Yellow Cab's opening brief concerning its argument on Smith's marijuana use are few and vague. Rule 13(a)(4), Ariz. R. Civ. App. P., requires that the appellant include "appropriate references to the record" in the statement of facts of its opening brief. We caution counsel that failure to comply with these requirements may result in waiver of the issue. *See Watahomigie v. Ariz. Bd. of Water Quality Appeals*, 181 Ariz. 20, 26, 887 P.2d 550, 556 (App. 1994) (court of appeals will not consider issues not properly briefed). "'Judges are not like pigs, hunting for truffles buried [in the record].'" *Ramirez v. Health Partners of S. Ariz.*, 193 Ariz. 325, n.2, 972 P.2d 658, 660 n.2 (App. 1998), *quoting United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (alteration in *Ramirez*). Furthermore, in the absence of a transcript, we will presume the record supports the trial court's ruling. *Kohler v. Kohler*, 211 Ariz. 106, n.1, 118 P.3d 621, 623 n.1 (App. 2005).

show that self-medicating with marijuana would have had any effect on Smith's recovery. And the trial court could have properly determined that a suggestion that Smith used marijuana, based on one notation in a medical report, would unfairly prejudice Smith with the jury. For reasons we have already explained, Yellow Cab's argument that the precluded evidence is admissible to complete the story does not compel a different result. *See Weaver*, 158 Ariz. at 410, 762 P.2d at 1364. Therefore, we conclude the trial court did not abuse its discretion when it concluded, pursuant to Rule 403, that evidence of Smith's marijuana use was more prejudicial than probative and therefore inadmissible.

Conclusion

¶15 Based on the foregoing, we conclude the trial court did not abuse its discretion in granting Smith's motions to preclude evidence pursuant to Rule 403. We therefore affirm the judgment.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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PETER J. ECKERSTROM, Judge